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No. 76-658

In the Supreme Court of the United States

OCTOBER TERM, 1976

NORFOLK, BALTIMORE AND CAROLINA LINES, INC., AND LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 28-32) is reported at 539 F. 2d 378. The opinion of the Benefits Review Board (Pet. App. 15-22) is reported at 2 BRBS 11. The administrative law judge's decision (Pet. App. 9-14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1976. A petition for rehearing with suggestion of rehearing *en banc* was denied on September 17, 1976 (Pet. App. 33). The petition for a writ of certiorari was filed on November 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the application to a post-amendment death of an amendment to the Longshoremen's and Harbor Workers' Compensation Act, which alters the condition of entitlement for death benefits relating to a pre-amendment injury, is unconstitutionally retrospective.

2. Whether the amended Longshoremen's Act contains such inconsistencies and incongruities that it cannot be applied.

3. Whether an amendment to the Longshoremen's Act providing death benefits if a person is disabled from a compensable injury and dies from unrelated causes exceeds Congress' admiralty powers.

STATUTE INVOLVED

1. Prior to its amendment in 1972, Section 9 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1429, 33 U.S.C. 909, provided in relevant part:

> If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following. * * *

2. As amended by the Longshoremen's and Habor Workers' Compensation Act Amendments of 1972, Section 9, 86 Stat. 1253, 33 U.S.C. (Supp. V) 909, now provides in relevant part:

> If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following. * * *

STATEMENT

Lee Rouse was a longshoreman employed by the Norfolk, Baltimore and Carolina Lines, Inc., on a barge on navigable waters of the United States, to unload cargo. On July 6, 1965, in the course of his employment, Rouse sustained a disabling and compensable injury under the Longshoremen's and Harbor Workers' Compensation Act (Pet. App. 10). Rouse was awarded compensation for permanent total disability (*ibid.*). Compensation was paid until February 11, 1974, when Rouse died from causes unrelated to the employment injury (*id.* at 10-11).

Extensive amendments to the Longshoremen's Act became effective on November 26, 1972, after the date of Rouse's injury but before the date of his death.[1] Section 9 of the Act as amended provides that death benefits shall be paid to the statutory survivors if the decedent, at the time of death, was permanently and totally disabled because of a compensable injury. Under the amended Act, unlike the prior statute, the cause of death is irrelevant.

The Benefits Review Board concluded that the 1972 amendments apply to this case; accordingly, it ordered petitioners to pay death benefits to Rouse's statutory survivors (Pet. App. 15-22). The court of appeals affirmed (Pet. App. 28-32), considering and rejecting the arguments petitioners make here.

ARGUMENT

1. Petitioners contend that the application of the 1972 amendments to a person whose last employment-related injury took place before the effective date of the amendments is unconstitutionally retrospective. There is no reason for the Court to consider this argument at the

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[1]See 86 Stat. 1251 *et seq.*, 33 U.S.C. (Supp. V) 901 *et seq.*

present time. The instant decision is the first to pass upon the application of the amendments to the death benefit provisions of the Act, and there is no conflict among the circuits on the question presented here.[2]

Moreover, the decision below is consistent with the many decisions that have applied previous amendments to Section 9 to deaths following injuries that occurred before the date of the amendments. *Hampton Roads Stevedoring Corp.* v. *O'Hearne*, 184 F. 2d 76 (C.A. 4); *Travelers Insurance Corp.* v. *Toner*, 190 F. 2d 30 (C.A.D.C.), certiorari denied, 342 U.S. 826; *Penn Jersey Welding Co.* v. *Lowe*, 183 F. 2d 936 (C.A. 3); *Hitt* v. *Cardillo*, 131 F. 2d 233 (C.A.D.C.), certiorari denied, 318 U.S. 770; *Brown-Pacific Maxon Co.* v. *Cardillo*, 91 F. Supp. 968 S.D. N.Y.). All of these courts have held—in our view properly—that the statutory right to death benefits does not accrue until the time of death, so that the law in effect at the time of death governs. Under this approach the application of the amended statute in the instant case is not retrospective.

Even if the application of the 1972 amendments to this case could be characterized as retrospective, however, no constitutional provision would be violated. Courts ordinarily apply the law in effect at the time the case is before them, not the law in effect at the time of the events giving rise to the litigation, even though this may create some retrospective application. See *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696. See also *Usery* v. *Turner Elkhorn Mining Co.*, No. 74-1302,

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[2]Similar cases are pending in other courts of appeals. *State Insurance Fund* v. *Pesce*, C.A. 2, No. 76-4165, argued November 30, 1976; *Todd Shipyards Corp.* v. *Witthuhn*, C.A. 9, No. 76-1067 (not yet argued); *Albina Engine & Machine Works* v. *McDonald*, C.A. 9, No. 76-2589 (not yet argued).

decided July 1, 1976, which upheld the constitutionality of the Black Lung Benefits Act of 1972, 86 Stat. 150 *et seq.*, 30 U.S.C. (Supp. V) 901 *et seq.*, amending Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792 *et seq.*, 30 U.S.C. 901 *et seq.*, The statute at issue in *Turner Elkhorn* imposed upon mine operators liability for pneumoconiosis contracted by miners whose employment ended before the enactment of the statute; it also provided for payments to the survivors of miners afflicted with pneumoconiosis but who died from other causes. If, as the Court held, the statute in question in *Turner Elkhorn* comports with the Constitution, so too do the 1972 amendments to the Longshoremen's Act.

2. Petitioners assert (without elaboration) that the 1972 amendments to the Longshoremen's Act "contain incongruities and inconsistencies" (Pet. 3) that make application of the Act "impractical and impossible" (*ibid.*). We do not perceive any insurmountable inconsistencies in the amended Act. Section 9 is clear and unambiguous; the intent of Congress is not in doubt. Petitioners apparently believe that certain definitional portions of the Act, not amended in 1972, conflict with the amended portions. But it is axiomatic that the most recent portions of a statute supersede earlier and inconsistent portions. The definitions in the Longshoremen's Act cannot be used in a mechanical or hypertechnical fashion to defeat the plain intent of Congress. *Lawson* v. *Suwannee Fruit & Steamship Co.*, 336 U.S. 198.

3. The 1972 amendments to the Act do not exceed the power of Congress to make laws in admiralty. *Crowell* v. *Benson*, 285 U.S. 22, upheld the original Longshoremen's Act against a similar challenge. As the Court observed in *Crowell*, once Congress has legislated within the bounds of its admiralty power, it is for Congress alone to determine the substantive rights involved. In the instant case

Rouse was injured and permanently disabled while engaged in maritime employment; that was enough to establish the admiralty power of Congress, and the fact that Rouse died after his employment had ceased does not sever the maritime nexus. The decision to provide death benefits, regardless of the cause of death, to the survivors of persons permanently and totally disabled by maritime injuries advances the goal of indemnifying the maritime worker and his survivors, and thus is a necessary and proper exercise by Congress of its admiralty powers. Cf. *United States* v. *Oregon*, 366 U.S. 643, 648-649.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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